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No.

In The
Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF LOUISIANA
Defendant-Appellant,
VERSUS
ROY HRYHORCHUK
Plaintiff-Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the Louisiana District Court and reviewing state appellate courts deprive defendant-appellant of due process and equal protection of the law in this particular case by taking tentative, speculative, and merely-possible factual findings articulated by an appellate court on a previous appeal for the sole and limited purpose of testing and overruling a previously granted motion by defendant-appellant to dismiss at the close of plaintiff's evidence and misapplying such findings to the ultimate merits of the case on remand as though they were final, fully adjudicated findings, for the radically different purpose of ultimately deciding the case, without a full and fair review and analysis of all the evidence in light of the properly applicable procedural and substantive law, when such misapplication of such factual findings occurs in no other like case in Louisiana?

2. Did the Louisiana Supreme Court, the Louisiana Court of Appeal, and the Louisiana District Court deprive defendant-appellant of due process and equal protection of the law by relieving plaintiff-appellee of his burden to prove the elements of his alleged cause of action and placing upon defendant-appellant not merely the burden of going forward with some evidence but rather the entire ultimate burden of both proof and persuasion on the merits, when in all other like cases in Louisiana such burden of proof and persuasion on the merits is always plaintiff-appellee's and never shifts therefrom?

3. Did the Louisiana Supreme Court, the Louisiana Court of Appeal, and the Louisiana District Court vio-

late due process of law and equal protection of the laws in arbitrarily holding that, of two persons in the exact same factual circumstances—i.e., both present and viewing, at the very same time, the very same accident scene and the very same potential hazards thereof—one was negligently liable in failing to foresee, and take steps to prevent, the risk of harm to the other but the other was not contributorily negligent in failing to foresee, and take steps to prevent (e.g., merely walking a few paces out of the foreseeable danger zone) the exact same risk of harm to himself, especially when the substantive law of Louisiana in all other cases at least requires the exact same standards for both negligence liability and contributory negligence bar to recovery?

4. Did the Louisiana Supreme Court, the Louisiana Court of Appeal, and the Louisiana District Court deprive defendant-appellant of due process and equal protection of the law by improperly holding defendant-appellant liable, under the doctrine of *respondeat superior*, for the actions of a person over whom defendant-appellant did not have any power of direction and control nor any other real, factual connexity which would permit a reasonable and non-arbitrary casting of vicarious liability on a faultless defendant-appellant for the fault of another, although such power of direction and control and factual connexity is required for vicarious liability under the doctrine of *respondeat superior* to attach in all other like cases in Louisiana?

5. Did the Louisiana Supreme Court deny defendant-appellant due process and equal protection of the law by allowing judgment to be rendered against

defendant-appellant even though it was not truly a participant nor adequately given notice of the suit at the outset, though such rights are required to be given all other defendants in all other like cases in Louisiana?

6. Did the Louisiana state courts, particularly the appellate courts, deny defendant-appellant due process and equal protection of the law in this particular case by arbitrarily and capriciously casting civil liability on defendant-appellant without a meaningful hearing in a meaningful manner and/or a meaningful appeal, in holding defendant-appellant liable while refusing to acknowledge and address at all several principal issues that were properly raised by defendant-appellant and obviously need to be resolved in order to find defendant-appellant liable in this civil case, a case conceded by the state judiciary to have warranted, under state practice, a non-summarial, full-scope appellate treatment and opinion by the appellate court, when all other defendant-appellants in all other like cases in Louisiana are afforded such rights denied herein?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is appealed from are as follows: Roy Hryhorchuk, plaintiff-appellee; Travelers Insurance Company, defendant-appellee; Louisiana Department of Transportation and Development, defendant-appellee; State of Louisiana, defendant-appellant; Roy M. Smith, defendant (position taken on appeal unknown); State Farm Automobile Insurance Company, defendant (position taken on appeal unknown); William R. Clifton, defen-

dant (position taken on appeal unknown); and Pennsylvania General Insurance Company, defendant (position taken on appeal unknown).

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the Louisiana Supreme Court's denial of defendant-appellant's application for writs of certiorari and review (dated June 21, 1982) is reported at 416 So.2d 117 (La., 1982) (App. A, infra). The decision of the Louisiana Court of Appeal for the Third Circuit affirming the district court's decision on remand is reported at 412 So.2d 197 (La. App. 3rd Cir., 1982) (App. B, infra). The judgment on remand and the reasons therefor of the Fourteenth Judicial District Court for the Parish of Calcasieu, dated June 12, 1981, are not officially reported (App. C, infra).

The previous opinion of the Louisiana Supreme Court, affirming in part, reversing in part, and remanding the case back to the district court is reported at 390 So.2d 497 (La., 1980) (App. D, infra). The previous decision by the Louisiana Court of Appeal for the Third Circuit affirming and amending the trial court's judgment is reported at 379 So.2d 281 (La. App. 3rd Cir., 1980) (App. E, infra). The previous judgment and reasons therefor of the Fourteenth Judicial District Court for the Parish of Calcasieu, dated December 29, 1978, are not officially reported (App. F, infra).

JURISDICTION

This is an appeal from the denial of a writ of certiorari and review by the Louisiana Supreme Court on June 2, 1982. No application for rehearing is permitted by Louisiana law. Appellant's notice of appeal to the United States Supreme Court was filed with the Louisiana Supreme Court, the Louisiana Court of Appeal for the Third Circuit, and the Fourteenth Judicial District Court for the Parish of Calcasieu on September 16-17, 1982. This appeal is taken pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the constitutionality of the manner in which the Louisiana state courts applied what are otherwise facially-valid, general state constitutional, statutory, and court rule provisions concerning the courts' jurisdiction and procedure and the substantive law applicable to this case. It is the particular activity in

ERRATUM:

On page 2, at the beginning of the third line under caption "JURISDICTION", "June 2, 1982" should

this case of these state courts acting under their generally granted constitutional and statutory powers, but not those state constitutional and statutory provisions themselves on their face, that is alleged to violate the federal constitution. Pertinent state constitutional and statutory provisions that are involved in the context of this case are set forth in Appendix "I" hereof. Their citations are as follows: La. Constitution Article 4, §§5(A) and 8, Article 5, §§5, 10, 16, and Article 12, §10. Louisiana C.C.P. Articles 1265, 1635, 1810(B), 2128, and 2129. La. R.C.C. Articles 453, 2286, and 2320. Louisiana R.S. 13:5107 and 42:1.

Defendant-appellant contends that the actions of the state courts in this case violate the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, to wit:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The overall inquiry presented on this appeal is whether the Louisiana state judiciary, acting pursuant to their judicial function and jurisdiction under the constitution and laws of the state and rules of the state

court, violated the due process and equal protection clauses by the manner in which the state's courts cast civil liability on defendant-appellant in this particular personal injury case.

As a necessary reference to an understanding of the context in which the issues on this appeal arose, an overview of the proceedings below is appropriate. This personal injury case proceeded to trial consolidated with a related insurance coverage declaratory judgment action. Defendant-appellant submits that it had not been properly served per se with notice of the lawsuit and was, for all real, practical purposes, unrepresented by counsel at that time. At the close of plaintiff's presentation of evidence and before any defendant was given the opportunity to present evidence, several defendants (including two agents of defendant-appellant) made and were granted motions to dismiss at the close of plaintiff's evidence. The trial judge continued the trial as to other defendants and found them liable to plaintiff in damages for personal injuries. Plaintiff appealed the summary dismissals (at the close of plaintiff's evidence) as to those defendants (including two agents of defendant-appellant) who were granted such motions to dismiss at the close of plaintiff's evidence, and the defendants who completed their trials and were found liable to plaintiff appealed their judgments. The Louisiana Court of Appeal for the Third Circuit affirmed all judgments as to party liability or non-liability but reduced the quantum of award to plaintiff against those few defendants found liable. The Louisiana Supreme Court granted writs, reinstated the quantum as to those who had been found liable, reversed

the ruling on the motions to dismiss at the close of plaintiff's evidence as to the two agents of defendant-appellant, postulated that defendant-appellant would be liable but in a manner wholly unrelated to and unconnected with and not "through" defendant-appellant's two agents but also conflictingly opined that defendant-appellant had always been a party because it was named through these two agents, even though service of process (notice of the lawsuit) was never properly served on defendant-appellant itself as principal, but only on the two agents, and defendant-appellant was not represented by any counsel attempting to defend defendant-appellant itself. Rather, one of defendant-appellant's agents was represented by counsel for the agent's insurer who took the position that defendant-appellant itself should be held liable directly rather than the insured agency and its insurer. Only after such holding, then informally informed of the Louisiana Supreme Court's opinion, did defendant-appellant's counsel (the attorney general) file an amicus brief on rehearing only. The state's high court denied rehearing. The case was then remanded to complete the trial. Shortly prior to the then remanded continuation of this trial previously begun, plaintiff-appellee at last caused defendant-appellant to be properly served with his petitions and notice of the basis of his claims. Defendant-appellant participated after remand; however, the trial continued from the point of the previous ruling at the close of plaintiff's evidence, and plaintiff-appellee's witnesses, other than plaintiff himself, were not brought back to allow defendant-appellant to cross-examine them. Defendant-appellant did, however, put on witnesses that

had not testified previously and brought out new testimony and evidence that clearly showed key errors in the previous evidence and in the previously postulated factual findings formulated from the plaintiff's evidence alone in the prior trial. However, the state trial and appellate courts sitting below the Louisiana Supreme Court took the factual findings of the state's high court from the prior appeal, which findings were only postulated by the high court as tentative, speculative, merely-possible facts findable only from evidence presented by and favorable to plaintiff for the limited purpose of testing and overruling a motion to dismiss at the close of plaintiff's evidence, and considered them to be some kind of already "determined facts" for purposes of ultimately deciding the case on the merits from all the evidence, refused even to consider and address necessarily adjudicative issues properly raised by defendant-appellant, and, though conceding that the case was one in the class of cases requiring, under state practice, non-summarial, full-scope treatment and opinion and giving lip-service thereto, meaninglessly affirmed the liability of defendant-appellant on the basis of the already "determined facts" from the previous (interlocutory) appeal to the Louisiana Supreme Court (at a time in which defendant-appellant, as explained above, was not really itself a true participant). The Louisiana Supreme Court easily avoided defendant-appellant's issues by simply denying defendant-appellant's writ application (though two of the seven justices voted to grant the writ). From these rulings of the Louisiana state judiciary, defendant-appellant takes this appeal to this Honorable Supreme Court of the United States as the last

resort in the hope that this Honorable Court will order the state's judiciary to give a truly fair and meaningful hearing to defendant-appellant in this case and on the necessarily adjudicative issues defendant-appellant has properly raised in same.

The importance of these events to this appeal are manifold. It must be clearly understood under Louisiana law that sovereign immunity of the state, its separate agencies, and its separate political subdivisions (including parishes [counties] as bodies politic), is waived in state court personal injury suits under a recognized rule that the sued body politic or agency, having, for purposes of such suits, the capacity of a private person per Louisiana Revised Civil Code Art. 453 and other law, must therefore be given the same rights, including constitutional rights, as any other private party litigant (La. Constitution Art. XII, Section 10; *Lewis v. State*, 207 La. 194, 20 So.2d 917 (La., 1945) and *Crain v. State*, 23 So.2d 336 (La. App. 1st Cir., 1945); that, therefore, in such suits every procedure which violates due process and/or equal protection is the same procedure as can be used with respect to any and all other litigants and is a universal violation of due process and/or equal protection; and that the relationship of state (body politic) and state agency (department) is likened, for state lawsuit purposes, to the relationship between principal-in-interest and agent or mandatary, *State v. Texas, Co. et al.*, 199. La. 846, 7 So.2d 161 (1942) and, after remand, 205 La. 517, 17 So.2d 569 (1944). Citation and service of process (notice of the lawsuit) upon the state (body politic) as the principal-in-interest is effected, under La. R.S. 13:5107 and La. C.C.P. Art. 1265, only by service

upon the Governor, the chief executive officer of the State (La. Constitution Art. IV, Section 5), or the Attorney General, the chief legal officer and dejure "counsel of record" in civil cases for the state (La. Constitution Art. IV, Section 8). Although citations were addressed to the "State through the Department of Public Safety" and the "State through the Department of Highways," no service thereof was properly made upon the "State of Louisiana" (body politic) as the principal, but only upon such principal's agents (the two departments). It is thus contended that the principal itself lacked sufficient notice to be cast in judgment, particularly on grounds wholly unrelated to such principal's relationships to the two such agents served and that such lack of notice violated due process (and also equal protection as no other parties are to be treated thus under Louisiana practice). In fact, the Department of Transportation and Development (Highways) sent in attorneys who purported to represent their department only and set up a defense aimed to show only that Constable Smith was not an employee of the department alone, and the Department of Public Safety, worse yet, was represented only by counsel for Travelers (providing its insured with a defense) who ultimately contended that the State Treasury rather than Travelers was liable for damages (in other words, a defense in direct opposition to the principal-in-interest). The Louisiana Supreme Court, as it turns out, virtually held, before the principal-in-interest was ever served with citation or other notice of the lawsuit, that the principal-in-interest was liable for Constable Smith directly without regard to (and *not* "through") the two agencies and wholly unrelated to them.

Thus, without true participation by defendant-appellant per se, which had not yet been served with notice of the lawsuit, the plaintiff put on his presentation of evidence in chief at trial. Following his presentation of evidence, certain of the defendants, including the two agents of defendant-appellant, moved the court to dismiss the plaintiff's case against them pursuant to La. Code of Civil Procedure (CCP) Art. 1810(B). Article 1810(B) provides,

> In an action tried by the Court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

These motions to dismiss at the close of plaintiff's evidence were granted as to those defendants who were the alleged "masters" of Justice of the Peace's Constable Smith. The trial was continued as to the other defendants, and they were found liable to plaintiff-appellee in damages for personal injuries.

The state Court of Appeal, Third Circuit, affirmed the CCP Art. 1810(B) dismissals and affirmed the liability of the other defendants cast in final judgment but reduced the quantum of award.

The Louisiana Supreme Court granted writs and reversed the reduction in quantum of the award. The

state's high court also affirmed the liability of those defendants who had completed trials and been cast in judgment. Then, in testing the propriety of the granting of the CCP Art. 1810(B) motions, the state's high court (using the tests for CCP Art. 1810(B) motions—i.e., a postulated set of merely-possible facts gleaned only from plaintiffs's presentation of evidence and only from evidence, therefore, most favorable to plaintiff)—overruled and reversed the granting of the CCP Art. 1810(B) motions to the two agents of defendant-appellant, opining conflictingly that defendant-appellant was named in the suit through its two so-named agents but also that the postulated liability of defendant-appellant lay in its relationship directly to the constable and not through the only two so-named agents of defendant-appellant served with notice of the lawsuit.

It was only after remand from this decision of the Louisiana Supreme Court that defendant-appellant was at last properly served with notice of the lawsuit. But when counsel for defendant-appellant faced the proceedings on remand, what counsel discovered was that trial began where it had left off—at the close of plaintiff's evidence. Plaintiff-appellee's witnesses were not brought back for cross-examination. Moreover, the actual attitude of the courts was that the Louisiana Supreme Court, in overruling the CCP Art. 1810(B) motion, had expressed its final decision on the merits of this trial (even before defendant-appellant was ever served with notice of the lawsuit), and that the courts would go through the motions of a trial and appeal procedurally but, as for any practical substantive outcome, the out-

come on the merits expressed by the Louisiana Supreme Court, even in merely overruling a CCP Art. 1810(B) motion, would have to be fulfilled. Thus, in spite of the fact that defendant-appellant put on witnesses that had not yet testified and brought out new and different testimony and evidence showing key errors in the previous evidence and the prior misunderstandings of the true factual situation and in spite of new issues which were properly and timely raised by defendant-appellant and which, under the law, need to be resolved in order to cast liability on defendant-appellant, these courts, though conceding that this case required non-summarial, full-scope treatment and opinion (particularly on appeal) and paying lip-service to same, simply refused to acknowledge and address, much less attempt to resolve, these issues and evidence and rendered judgment against defendant-appellant in accordance with what they felt to be the wishes of the Louisiana Supreme Court as expressed on the prior appeal. In fact, the Court of Appeal, Third Circuit, expressly relied on the already "determined facts surrounding the accident" and "the conclusions of law based upon those facts."

Highlighting what is submitted to be the arbitrariness of such a decision is the context of Louisiana law concerning the circumstances and effect of the prior Louisiana Supreme Court opinion before remand and its supposed non-effect on defendant-appellant's right to be heard on subsequent issues and defenses.

First among the context of Louisiana law in this regard are the issues which were properly and timely raised, as the errors occurred, but which the state courts

refused to acknowledge and address. The Louisiana procedural law as to raising such issues is liberal. C.C.P. Art. 1635 states:

> Art. 1635. Exceptions unnecessary
>
> Formal exceptions to rulings or orders of the court are unnecessary. For all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

As to raising the issues on appeal, C.C.P. Arts. 2128 and 2129 state,

> Art. 2128. Same; determination of content
>
> The form and content of the record on appeal shall be in accordance with the rules of the appellate court, except as provided in the constitution. However, within three days, exclusive of holidays, after taking the appeal the appellant may designate in a writing filed with the trial court such portions of the record which he desires to constitute the record on appeal. Within five days, exclusive of holidays, after service of a copy of this designation on the other party, that party may also designate in a writing filed with the trial court such other portions of the record as he considers necessary. In such cases the clerk shall prepare the record on appeal as so directed, but a party or the trial court may cause to be filed thereafter any omitted portion of the record as a supplemental record. When no designation is made, the record shall be a transcript of all the pro-

ceedings as well as all documents filed in the trial court.

Art. 2129. Assignment of errors unnecessary; exception

An assignment of errors is not necessary in any appeal. Where the appellant designates only portions of the record as the record on appeal, he must serve with his designation a concise statement of the points on which he intends to rely, and the appeal shall be limited to those points.

As for this particular case, no particular parts of the record were designated, and the appeal was heard on the entire record. By rules, the Supreme Court of Louisiana, for writ applications, and the Louisiana Courts of Appeal, for appeals and rehearing applications, (the procedures this case followed) has provided for defining assignments of error (forming the basic issues) in, respectively, the writ application and appellate brief. Defendant-appellant has faithfully done so.

Secondly, these issues arose in connection with a remand after the state's high court postulated a theoretical factual situation for the limited purpose of testing and overruling a motion to dismiss at the close of plaintiff's evidence under C.C.P. Art. 1810(B), supra. In cases before a judge alone and not a jury, such as this one, some distinctions have now recently been made in the different state Court of Appeal circuits concerning the evidenciary standard to be applied, although its appears that at the time of this case in the Third Circuit, the view of the evidence in the light most favorable to plaintiff, was the standard. Be that as it may, to determine ultimate facts as to liability against a defendant,

who has not yet even been given the opportunity to present evidence, offends all notions of justice, even under Louisiana law. *Gunter v. Plauche et al.*, 399 So.2d 727 (La. App. 1st Cir., 1981). Likewise, it is submitted that it is arbitrary simply to rely on such postulated, theoretical factual findings made from only plaintiff's presentation of evidence for the ultimate decision on the merits without giving either a meaningful acknowledgment of or a meaningful analysis to the defendant's evidence, especially when that evidence is new and contains some uncontroverted showings that some key errors in the prior factual findings had been made.

Thirdly, it must be clearly understood that no kind of collateral estoppel exists at all in Louisiana, and the Civilian Law doctrine of "res judicata" under La. Revised Civil Code Art. 2286 is extremely narrower than the Common Law concept thereof. *Welch v. Crown-Zellerbach Corp.*, 359 So.2d 154 (La., 1978), preceded by *Mitchell v. B[illegible]lla*, 240 So.2d 287 (La., 1976). Thus, no findings in the first appeals in this case on the merits of plaintiff-appellee's action against other defendants can affect at all plaintiff-appellee's alleged action against defendant-appellant, and issues and assignments of errors ("grounds") raised by defendant-appellant after remand cannot be arbitrarily ignored or "estopped" by anything that occurred on the previous appeals. Given this context of Louisiana law, arbitrariness and capriciousness is clearly inferred by a court's refusal to adjudge such necessary issues and grounds.

In Louisiana, as in all other states, in an action for personal injuries sustained as a result of the alleged neg-

ligence of a defendant, the burden is on the plaintiff to prove all of the essential elements to establish negligence on the part of the defendant. *Sullins v. City of Shreveport*, 229 So.2d 390 (La. App. 2nd Cir., 1969). It is elementary that the plaintiff must produce proof in support of each and every element of his claim. *Livingston Supply Co. v. Basso*, 164 So.2d 141 (La. App. 1st Cir., 1964). Since the plaintiff must prove every element of his cause of action, the defendant needs only to defeat the plaintiff on one element to win. *Laird v. Travelers Indemnity Co.*, 236 So.2d 561 (La. App. 4th Cir., 1970). In a negligence action, such as the present case, the plaintiff has the burden of proof and ultimate persuasion throughout, and the trial judge at the conclusion of the trial weighs *all* the evidence offered and determines the preponderance. *Ned v. Hertz Corp.*, 356 So.2d 1974 (La. App. 4th Cir., 1978).

As the Court in *Wallace v. Shreveport Rys. Co.*, 175 So. 86 (La. App. 2nd Cir., 1973) stated,

> "The onus of proof, after the prima facie showing, strictly speaking, did not shift, but it did then devolve upon defendant to adduce proof of lack of negligence of its part. . . .
>
> "Although it has sometimes been stated that the burden of proof will shift to defendant on plaintiff making out a prima facie case, this statement is inaccurate, and, where defendant sets up a plea or answer denying its liability, the main burden of proof does not shift, but is on plaintiff throughout the case, even where a presumption of negligence exists, although where plaintiff introduces evidence sufficient to make out a prima facie case, it is then incumbent on defendant in order to prevent a recov-

ery to introduce evidence sufficient to overcome such showing by plaintiff. . . ."

The general rule is that the plaintiff, seeking to recover on a theory of negligence, is required to establish a prima facie case of negligence on the part of the defendant, after which the burden is on the defendant to go forward with evidence to rebut the inference of negligence. *Sansonni v. Jefferson Parish School Board*, 344 So.2d 42 (La. App. 4th Cir., 1977). It is axiomatic that the plaintiff must first establish this prima facie case before the defendant is obliged to rebut. *Greenup v. Barney*, 315 So.2d 910 (La. App. 4th Cir., 1975). The obligation to rebut plaintiff's prima facie evidence is the only "burden" to be placed on the defendant.

As explained by the Louisiana Supreme Court in *City of New Orleans v. Levy*, 233 La. 844, 98 So.2d 210 (La., 1957),

> "The burden of evidence . . . sometimes termed the burden of producing, or going forward with, the evidence, or the burden of procedure, shifts, or may shift, from side to side during the progress of the trial. . . . This burden of evidence is so continued until the party having the burden of proof establishes a prima facie case; nothing less will shift the burden of evidence. When such a prima facie case is established, the burden of evidence is shifted to the adverse party; the adverse party may, by the production of evidence destroying the prima facie case against him, satisfy the burden and restore it to the original party."

Therefore, while the burden of evidence or the burden of going forth with evidence may shift from party to party, the burden of proof and ultimate persuasion never

shifts from the plaintiff. This distinction is made clear in the *Levy* and *Wallace* cases, supra. The Louisiana Supreme Court, the Court of Appeal, and the district court, in failing to note this distinction, placed an improper burden of proof and ultimate persuasion on defendant-appellant that is never placed on other litigants in like circumstances and thereby violated due process and equal protection.

The Louisiana courts below effected an illegal and unconstitutional placing of the entire burden of proof and persuasion, which by law is placed on plaintiff, upon the defendant State of Louisiana to show that a "change" was warranted "in the court's [already] determined facts surrounding the accident" and "in the conclusions of law based upon such facts." *Hryhorchuk v. Smith*, 412 So.2d 197,200 (La. App. 3rd Cir., 1982). Thus, in this case, this improper shifting of the burden of proof and persuasion from the plaintiff (who would, in all other like cases, retain this burden throughout the course of the litigation) to defendant-appellant, possibly by confusing the burden of proof with the burden of evidence, is arbitrary and invidious in effect and thus violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

It is, likewise, submitted to be a violation of due process and equal protection clauses of both the federal and state constitutions for a state court to hold any person liable for damages caused through no fault of his own but only vicariously for an employee under the guise of *respondeat superior*, when the situation does not have the element of control expressed in Louisiana Civil Code Article 2320, which states,

Art. 2320. Masters and employers are answerable for the damages occasioned by their servants and overseers, in the exercise of the functions in which there are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

This is the same as the Common Law rule embedded in *stare decisis* at the times of the adoption of the Constitution of the United States and the Fourteenth Amendment thereto. Therefore, to hold a person liable without the element of control as expressed, for example, in the last sentence of Article 2320, above, in essence, arbitrarily casts liability on a faultless or innocent defendant for the tort of another over whom he had no control nor reasonable factual connection to warrant liability. One might simply, arbitrarily choose the richest man in town for liability.

The context of Louisiana law follows the general rule: A master or employer is liable for the tortious conduct of a servant or employee which is within the scope of employment, but a principal is not liable for the torts of a non-servant agent. Restatement of the Law, Second, Agency, § 250.

An agent's negligence is not imputable to the principal and the principal is not liable for such negligence unless a master-servant relationship exists between the parties. *Blanchard v. Ogima*, 253 La. 34, 215 So.2d 902

(La., 1968); *Traders and General Ins. Co. v. Robison*, 289 So.2d 178 (La. App. 1st Cir., 1973); *Badeaux v. East Jefferson General Hospital*, 364 So.2d 1348 (La. App. 4th Cir., 1978). Since liability should not be broadly or liberally imposed on a master or employer for the torts of his servant or employee where the master is not himself at fault, masters are only held liable for the acts of servants over whom they have control, as opposed to agents over whom they have little control. *Keen v. Pel State Oil Co., Inc.*, 332 So.2d 286 (La. App. 2nd Cir., 1976); *Florence v. Clinique Laboratories, Inc.*, 347 So.2d 1232 (La. App. 1st Cir., 1977). As the Fifth Circuit Court of Appeals recently stated,

> "A principal may be held liable for an agent's negligence if there is master-servant relationship. The indicia of such a relationship are the right of the principal to control the agent's time and physical activities and the existence of a close physical relationship between them." *Arceneaux v. Texaco, Inc.*, 623 F. 2d 924 (U.S. App. 5th Cir., 1980).

The mere fact that a constable is a public officer does not automatically transform him into a state officer. Under Louisiana law, R.S. 42:1 defines "public office" as any state, district, parish or municipal office. An examination of the element of control leads to the inescapable conclusion that a constable is a parochial office and *not* a state office.

Thus, it is further submitted to be a violation of equal protection for the state courts in this same case to apply the "power of control" standard to the Calcasieu Parish Sheriff's office and to the Calcasieu Parish Police Jury (the legislative governing body of the body politic,

Calcasieu Parish, itself) in order to find non-liability, while at the same time refusing to apply the same standard to defendant-appellant so that liability could be arbitrarily cast on defendant-appellant without any reference or regard to the lack of such power to control the manner of performing daily tasks and activities, etc.

Finally, the context of Louisiana law in which these issues arose is also that the very same factors and standards are to be applied alike to determine negligence liability and contributory negligence bar to recovery. *Stewart v. Gibson Products Company of Natchitoches Parish, Louisiana, Inc.*, 300 So.2d 870 (La. App. 3rd Cir., 1974). It is uncontroverted that Smith, defendant-appellant's alleged "servant," and plaintiff-appellee were both viewing the very same accident scene and the very same hazards thereof for the very same appreciable length of time before Clifton knocked Smith's parked car into plaintiff-appellee. In fact, plantiff-appellee was not as busy as Smith, but sat on or stood near a bridge rail near the side and rear of Smith's car where he could observe the previous eastbound vehicles coming up to Smith's car and being directed around the hazardous area and where he could observe whatever foreseeable risks of harm to himself there were right in plain view in front of him. Yet the state's courts ruled that Smith was negligent in failing to foresee the risk of harm to plaintiff-appellee and to take preventive steps not to breach any duty with respect thereto but that plaintiff-appellee was not contributorily negligent in also failing to foresee the very same risk of harm and taking preventive steps (merely walking a few paces out of the risk

area) to avoid same. It is submitted that such dichotomy of treatment of the very same factual situation provides the classic equal protection violation. In the manner done herein to cast legal liability on one in a judicial forum, it also violates due process.

THE QUESTIONS ARE SUBSTANTIAL

In the foregoing Statement of context in which the questions presented on this appeal arose, the questions presented hereinabove were defined both factually and legally with respect to this particular case, and it should be obvious that they provide a ratio decidendi to the ultimate outcome on the merits of this case and to its validity. For example, the generally classic federal equal protection question as to the dichotomy of treatment concerning negligence liability and contributory negligence bar to recovery operating in the same identical factual circumstances with respect to foreseeability of risks, etc., is an issue which goes directly to the heart and essence of whether ultimate liability can be validly cast on defendant-appellant in this case under the applicable state law which requires no overriding state interest to the contrary but rather that the same factors and standards be used. In conjunction with the questions presented herein about the state courts' failure to provide a meaningful hearing herein after proper notice of the lawsuit was served, the state courts simply refused to acknowledge and address, much less resolve, this generally classic federal equal protection issue, nor the other issues, properly raised by defendant-appellant. Had they done so, a judgment worth $627,389.24 could not and would not, it is submitted, have been cast. As it

stands now, such equal protection question presented herein could and should, by itself alone or in cumulative conjunction with the other questions presented herein, turn the entire case and invalidate the judgment. Thus, there can be no doubt about the substantiality of the questions presented herein.

But the substantiality of the federal constitutional questions presented on this appeal, defined and described hereinabove, transcends the substantial value of this case alone. These questions on appeal herein reach to the heart of the very foundations of American society, for the Louisiana courts below, particularly at the Court of Appeal level, have, as explained hereinabove, conceded that this case is one requiring non-summarial, full-scope treatment and opinion. Contrary to any countervailing overriding state interest in such doctrines as collateral estoppel and Common Law scope res judicata for judicial economy, the Louisiana courts have long declared, as explained in the Statement, supra, that neither collateral estoppel nor Common Law scope res judicata exists at all whatsoever in Louisiana, but rather only the very narrow one-party-on-one-party, same identical "grounds," and same demand type of res judicata peculiar to the Civilian-Law-based Louisiana Revised Civil Code Art. 2286. Thus, the judicial, lack-of-timely-notice (service of process) treatment given to defendant-appellant in this case by the Louisiana judiciary, as described and explained more fully in the Statement hereinabove, is proclaimed by the state courts to be the very same treatment and process that can be imposed in Louisiana at the state court's whim in any given ordinary proceedings case, one-party-on-one-

party, from its outset. And it is submitted that such treatment and lack of timely judicial process, described and defined more fully in the Statement, supra, falls woefully short of the fundamental notions required by American society and its constitution.

As Mr. Justice Harlan explained in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971),

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

It is fundamentally unfair and, therefore, unconstitutional to hold a defendant liable in damages without addressing the defendant's arguments in defense. *Boddie v. Connecticut*, supra; *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct 1983, 32 L.Ed. 2d 556 (1972). Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons who must settle their claims through litigation must be given a meaningful opportunity to be heard, granted at a

meaningful time and in a meaningful manner and without a shifting in burdens of proof or persuasion. *Boddie*, supra; *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct 1187, 14 L.Ed. 2d 62 (1965). Even though the formality and procedural requisites for the hearing can vary depending upon the importance of the interest involved and the nature of the subsequent proceeding, the litigant must be given the opportunity for a hearing before he is deprived of a property interest. Without this hearing in a meaningful manner appropriate to the nature of the case, the mandates of the Due Process Clause have not been complied with. *Boddie*, supra, at 786-787; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 at 313, 70 S.Ct 652 at 656, 94 L.Ed. 865 (1950). The Louisiana courts below are merely sought herein to fulfill, in a constitutionally valid manner, their basic duties under the laws and rules by which they ordinarily operate; no new duties for them are urged herein.

Closely allied to and somewhat overlapping these due process requirements and certainly not mutually exclusive from them, are the requirements of equal protection. The questions presented on this appeal drive to the very axiomatic foundations of even the most minimal notions of equal protection—that is, "equal protection of the laws" means that no one shall be denied the same protection of the laws enjoyed by or afforded to others in like circumstances. See, for example, *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964) and other cases too numerous to cite. In this case on appeal, the state courts not only failed to articulate any rational basis or overriding state interests in treating defendant-appellant differently and in failing to afford

defendant-appellant the same protection and defenses of the laws afforded to other litigants (especially defendants) in similar cases and circumstances, before casting them in a substantial money judgment, but they, moreover, made even no pretense whatsoever that there were any rational classifications (nor any different classifications at all, rational or otherwise) into which defendant-appellant might fall. They simply, arbitrarily denied to defendant-appellant the same legal defenses, procedures, and protections afforded to others under state law, as more fully described and explained hereinabove.

The question presented with respect to the state courts' thrusting on defendant-appellant in this case the ultimate burdens of not only proof but also persuasion, while in all other like cases such burdens are always on plaintiffs and not defendants in similar circumstances, is more than an incidental procedural question in this case. The opinion of the Louisiana Court of Appeal, Third Circuit, in stating that defendant-appellant failed to carry the burden of showing that a "change" was warranted in the already "determined facts surrounding the accident or in the conclusions of law based on such facts," explicitly relied on such thinking as the ratio decidendi of its decision to affirm the judgment on the merits herein against defendant-appellant. Since the Louisiana Supreme Court merely denied defendant-appellant's writ application, this question presented on appeal here strikes at the only articulated reason for the judgment appealed from.

The question concerning the same standards and factors for negligence liability and contributory negli-

gence bar to recovery, too, follows the basic, axiomatic equal protection meaning, for, contrary to purporting to create a differentiating classification or a countervailing state interest, the state law, as described in the Statement, supra, confirms that the same factors and standards are to be used. Thus, defendant-appellant's position is not that equal protection with respect to this issue was violated in the face of having to balance a state law interest to the contrary, but rather that *both* equal protection *and* state law were contravened by the judgments in the state courts below. This state law issue was never passed on, and no contrary state law interest vis-a-vis the equal protection issue was ever articulated, all because the state courts below arbitrarily in violation of due process and equal protection refused to acknowledge and address these issues (assignments of error), even though they were properly and timely raised, as explained in the Statement, supra.

The question presented regarding the casting of vicarious liability on a faultless defendant for the fault (tort) of another over whom he does not have the power of control that is universally recognized as the primary indicia of *respondeat superior* liability nor even from whom he receives any real economic benefit, also entails invidious wealth discrimination, as such arbitrary overreachings to cast liability on faultless defendants is, as was the case herein, usually motivated by a desire to catch someone (even only nominally connected with the case) who has the potential or substantial ability to pay large damage awards.

CONCLUSION

For any one or more of the foregoing reasons, probable jurisdiction should be noted for this appeal.

As an equally viable alternative, however, at this point, attention must be given to the fact that, as explained hereinabove, the state courts arbitrarily in violation of due process and equal protection ignored many state law issues properly and timely raised by defendant-appellant in this case. Some of these state law issues, if they were faced and decided by the state courts below, could have provided other dispositions of this case which might have otherwise avoided the federal constitutional questions raised, though, as the case stands now with the state courts' refusal to acknowledge and address these other state issues, this case stands ripe for the federal constitutional questions explained herein. Thus, it is brought to this Honorable Court's attention that the most facile way of giving effect to the constitutional protections which were violated in this case, might be, at least at this stage of the case, to treat this appeal perhaps as a writ application for the sole purpose of reversing or merely vacating the judgment appealed from herein and remanding to the Louisiana Supreme Court for a decision on these other issues of state law that remain as yet unresolved herein, similar to what was done, for example, in *U.S. v. Ballard*, 332 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1943) and *Aetna Gas. and Sur. Co. v. Flowers*, 330 U.S. 464, 67 S.Ct. 798, 91 L.Ed. 1024 (1946).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas S. Halligan, one of the assistant attorneys general for the State of Louisiana, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the seventeenth day of September, 1982, I served copies of the foregoing Jurisdictional Statement, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, upon the following:

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